A

SISTEM TELEVISYEN MALAYSIA BHD & ORS v. NURULLAH ZAWAWI & ANOR

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
AZAHAR MOHAMED JCA
B MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-2807-12-2013]
28 SEPTEMBER 2015

C ***TORT:*** *Defamation – Libel – Libel broadcast on television programme – Exemplary damages – Rules in Rookes v. Barnard – Whether programme was scheme calculated to make profits for defendants – Whether malice proved – Whether circumstances justifying exemplary or aggravated damages established*

D ***TORT:*** *Defamation – Libel – Damages – General rule – Whether damages assessed purely on compensatory basis – Amount of damages – Whether governed by circumstances of case – Whether amount awarded by trial judge fair and reasonable – Whether varied by appellate court*

E The respondents ('plaintiffs') sued the five appellants ('defendants') for defamation in relation to a television programme entitled 'Melodi' ('Melodi programme') of materials, which allegedly questioned the plaintiffs' marriage in Thailand. The plaintiffs' case was that the said Melodi programme had published defamatory words, which questioned the validity of the plaintiffs' marriage and had published private issues between the plaintiffs and the first plaintiff's biological family. According to the plaintiffs, there were two stings in this case which materially injured the plaintiffs. The first sting was that F the plaintiffs were alleged to be married without a 'wali', which carried the meaning that the plaintiffs' marriage was void and the plaintiffs were living in adultery and sin all this while. The plaintiffs' offspring, and in this instance, their infant child, would carry the taboo of illegitimacy all her life. The second sting was that the first plaintiff had made statements that she had G met her biological father and that he had refused to be her 'wali', would result in the first plaintiff being called a liar, a scoundrel and an insolent daughter to her parent. The High Court allowed the plaintiffs' claim and ordered the defendants to pay RM250,000 as damages and hence, the appeal by the defendants.

H **Held (allowing appeal)**
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) Based on the oral and contemporaneous evidence, the findings of the High Court Judge on the issue of liability were clearly justified. It had I not been shown that the findings were against the weight of evidence or perverse in any way. Hence, the decision on the issue of liability was affirmed. (para 25)

(2) The principle remedy sought by the plaintiffs was for an award of damages. Since libel had been established, as a matter of general rule, the law presumed some damage will result in the ordinary course when a defendant invades another's absolute right of reputation. The general rule is that the law assesses damage on a purely compensatory basis. The amount of damages will be governed by all the circumstances of the particular case, including the position and standing of the plaintiff, the nature of the libel and the whole conduct of the defendant from the time when the libel was published to the very moment of its decision. (para 30)

(3) There was absolutely no basis for exemplary damages, which is punitive in nature, to be considered under any of the three categories propounded in *Rookes v. Barnard* which were: (i) whether the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive or the servant of the government; (ii) the defendant's conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and (iii) a statute has expressly authorised it. (paras 31 & 32)

(4) The first to fourth defendants published the Melodi programme in response to the calls for help by the biological family members and the matter extended beyond just responding to the call for help. It was a programme designed to heal broken family relationships. There was no suggestion that the programme was a scheme calculated to make profits for the defendants. There was also no evidence that the defendants acted in any high-handed, oppressive, insulting or contumelious manner. The defendants broadcasted the news in question without malice to disseminate information of a public interest. Therefore, there were no established circumstances justifying either exemplary or aggravated damages. (para 36)

(5) The case was one for compensation in respect of the injury to the plaintiffs' reputation and honour. Based on the circumstances of the case, the award of damages made by the High Court in the sum of RM250,000 was set aside. Having considered the plaintiffs' position and standing as well as the nature of the defamation, a sum of RM80,000 by way of compensatory damages for both the plaintiffs was fair and reasonable compensation for the pain and suffering they had endured. (paras 7 & 37)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden ('plaintif-plaintif') menyaman kelima-lima perayu ('defendan-defendan') bagi fitnah berkaitan dengan program televisyen bertajuk 'Melodi' ('program Melodi') bagi bahan-bahan yang didakwa mempersoalkan perkahwinan plaintif-plaintif di Thailand. Kes plaintif-plaintif adalah bahawa program Melodi tersebut menerbitkan perkataan-

perkataan bersifat memfitnah, yang mempersoalkan kesahan perkahwinan plaintif-plaintif dan menerbitkan isu-isu peribadi antara plaintif-plaintif dan keluarga kandung plaintif pertama. Menurut plaintif-plaintif, terdapat dua sengatan dalam kes ini, yang telah melukai plaintif-plaintif. Sengatan pertama adalah bahawa plaintif-plaintif dikatakan telah berkahwin tanpa wali, yang membawa maksud bahawa perkahwinan plaintif-plaintif adalah batal dan plaintif-plaintif hidup berzina dan berbuat dosa selama ini. Anak plaintif-plaintif, dan dalam kes ini anak kecil mereka, akan membawa pantang larang anak di luar nikah sepanjang hidupnya. Sengatan kedua adalah bahawa plaintif pertama telah membuat kenyataan bahawa dia telah bertemu dengan bapa kandungnya dan bapa kandungnya enggan menjadi wali kepadanya, yang mengakibatkan plaintif pertama dipanggil penipu, jahat dan anak yang biadap terhadap bapanya. Mahkamah Tinggi membenarkan tuntutan plaintif-plaintif dan memerintahkan defendan-defendan membayar RM250,000 sebagai ganti rugi dan dengan itu, rayuan ini oleh defendan-defendan.

Diputuskan (membenarkan rayuan)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan keterangan lisan dan semasa, dapatan oleh Hakim Mahkamah Tinggi atas isu liabiliti jelas terbukti. Tidak ditunjukkan bahawa dapatan tersebut bertentangan dengan beban keterangan atau bertentangan dalam apa cara sekalipun. Dengan itu, keputusan mengenai isu liabiliti disahkan.

(2) Remedi utama yang dipohon oleh plaintif-plaintif adalah bagi award ganti rugi. Oleh sebab libel telah dibuktikan, secara amnya, undang-undang menganggap satu ganti rugi akan diberikan dalam perjalanan biasa apabila defendan mengganggu hak mutlak reputasi seseorang. Prinsip am adalah bahawa undang-undang menilai kerugian atas dasar pampasan semata-mata. Jumlah ganti rugi bergantung kepada kesemua hal keadaan sesuatu kes, termasuk kedudukan plaintif, sifat libel tersebut dan keseluruhan tindakan defendan dari masa libel diterbitkan sehingga keputusan diberikan.

(3) Jelas tiada asas untuk ganti rugi teladan, yang bersifat punitif, untuk dipertimbangkan di bawah mana-mana tiga kategori yang diperuntukkan dalam kes *Rookes v. Barnard* iaitu: (i) sama ada plaintif terluka oleh tindakan menindas, sembarangan dan tidak berperlembagaan oleh eksekutif atau kakitangan kerajaan; (ii) tindakan defendan telah dikira sebagai memberikan keuntungan kepada dirinya yang mungkin melebihi pampasan yang akan dibayar kepada plaintif; dan (iii) statut secara jelas membenarkannya.

(4) Defendan-defendan pertama hingga keempat telah menerbitkan program Melodi sebagai menjawab permintaan untuk bantuan oleh ahli keluarga kandung dan perkara tersebut telah melangkaui daripada setakat menjawab bantuan. Ia adalah program yang direka untuk memulihkan

hubungan keluarga yang terpecah. Tiada cadangan bahawa progam tersebut adalah muslihat untuk menjana keuntungan oleh defendan-defendan. Juga tiada keterangan bahawa defendan-defendan bertindak secara angkuh, menindas, menghina atau kesat. Defendan-defendan menyiarkan berita yang dipersoalkan tanpa niat jahat untuk mengedarkan maklumat yang berkepentingan umum. Oleh itu, tiada hal keadaan yang dibuktikan yang mewajarkan sama ada ganti rugi teladan atau ganti rugi teruk.

(5) Kes tersebut adalah bagi ganti rugi untuk kecederaan terhadap reputasi dan kehormatan plaintif-plaintif. Berdasarkan hal keadaan kes, award ganti rugi yang diberikan oleh Mahkamah Tinggi berjumlah RM250,000 diketepikan. Selepas mempertimbangkan kedudukan plaintif-plaintif dan sifat fitnah tersebut, jumlah RM80,000 secara ganti rugi pampasan bagi kedua-dua plaintif adalah pampasan yang adil dan munasabah bagi kesakitan dan penderitaan yang dialami mereka.

Case(s) referred to:

Cheong Chark v. Gammon (Malaya) Ltd [1939] 1 LNS 15 HC ***(refd)***

Datuk Patinggi Abdul Rahman Ya'Kub v. Abang Mohammad Abang Anding [1979] 1 LNS 16 HC ***(refd)***

McCarey v. Associated Newspapers Ltd [1964] 3 All ER 947 ***(refd)***

Rookes v. Barnard (No 1) [1964] AC 1129 ***(refd)***

Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 1 LNS 146 HC ***(refd)***

Other source(s) referred to:

Gatley on Libel and Slander, 8th edn, pp 592-593

For the appellants - Liew Teck Huat (Lim Qi Si with him); M/s Suflan TH Liew & Partners

For the respondents - Nadzarin Wok Nordin (Suzalena Salleh & Shazryll Aizad Ahmad Khairy with him); M/s Nadzarin Kuok Puthucheary & Tan

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 23NCVC-84-09-2011]

Reported by S Barathi

JUDGMENT

Azahar Mohamed JCA:

[1] In the High Court, the two respondents sued the five appellants for defamation in relation to a television programme entitled 'Melodi' (the Melodi programme) of materials, which the respondents alleged questioned the respondents' marriage in Thailand.

[2] We shall be referring to parties in this judgment in their respective capacity in the High Court.

[3] The plaintiffs' case was that the said Melodi programme, whether viewed in totality or otherwise, had published defamatory words, which questioned the validity of the plaintiffs' marriage, and had published the private issues between the plaintiffs and the first plaintiff's biological family.

[4] The High Court had, after a full trial, allowed the plaintiffs' claim and ordered the defendants to pay RM250,000 as damages with interest and costs fixed at RM70,000.

[5] Aggrieved by the whole decision of the High Court, all the defendants filed an appeal to this court. We heard the appeal. At the conclusion of the hearing of the appeals, by unanimous decision, we decided:

(a) The appeals by the defendants on liability are dismissed;

(b) The award of damages made by the High Court in the sum of RM250,000 be set aside and substituted with an award in the sum of RM80,000;

(c) There is no order as to costs of the appeal;

(d) The order as to costs made by the High Court in the sum of RM70,000 to stand; and

(e) The deposit to be refunded to the defendants.

[6] Following our decision, the plaintiffs had filed an application for leave to appeal to the Federal Court on issue of damages.

[7] We now give our reasons for setting aside the award of damages made by the High Court in the sum of RM250,000 and substituting it with an award in the sum of RM80,000.

[8] The facts of the case are well set out in the judgment of the learned High Court Judge. Very briefly the background facts giving rise to the appeal are as follows.

[9] The plaintiffs are a married couple. In 2004, the first plaintiff was a contestant in the ASTRO organised talent contest "Akademi Fantasia Musim Ke-2" (AF2) and she successfully advanced to the final rounds. From 2004 onwards and subsequent to the AF2 show, the first plaintiff's career as a singer and entertainer blossomed. She achieved something of a celebrity status.

[10] The second plaintiff is a law lecturer in a local university. Prior to his career as a lecturer, he was a Deputy Public Prosecutor at the Attorney General's Chambers, Malaysia.

[11] The first plaintiff was born to the couple, Encik Zawawi and Puan Dara in Kuching, Sarawak. The first plaintiff was given away by her biological family for adoption to a childless couple when she was still an infant. Shortly after the first plaintiff was given away for adoption, her

biological and adoptive families were involved in a family dispute and were intensely hostile towards each other ever since. Due to the family dispute, she was never introduced to her biological family. A

[12] The first plaintiff met the second plaintiff in 2010 and they later got engaged in February 2011. It was during the engagement that the bride's wedding ceremony was fixed on 28 May 2011 and 29 May 2011 and the groom's side a week later on 3 June 2011 (the wedding ceremonies). B

[13] After the engagement, her adopted mother had assured the first plaintiff that she would assist her to approach her biological father in regard to her wali mujbir (wali by way of blood relation) arrangement. As events turned out, the first plaintiff's biological father refused to be her wali. As a result of which on 23 April 2011, the plaintiffs' marriage was solemnised at the Islamic Council of Narathiwat Province, Thailand by way of wali hakim. C

[14] It was the plaintiffs' case that the solemnisation had to be done in order to save the wedding ceremonies as all the preparation had been undertaken, including purchasing air-flight tickets, chartering accommodations and transports for the groom's family/relatives. On 26 May 2011, Mahkamah Syariah Hulu Langat issued a court order declaring that the plaintiffs' marriage is valid according to Hukum Syara'. D

[15] The first defendant is a company operating a leading free-to-air television channel in Malaysia (also known as TV3). The second defendant is one of the first defendant's producers. The third defendant is one of the first defendant's television journalists/producers. The fourth defendant is a company operating the website www.tonton.com.my on which the Melodi programme can be viewed. The fifth defendant is one of the biological brothers of the first plaintiff. E F

[16] Amongst the many popular programmes aired regularly over the first defendant's television channel is one entitled 'Melodi'. 'Melodi' is a light-hearted infotainment programme focusing largely on the local entertainment scene. 'Melodi' also features at times, a segment dedicated to public complaints, especially involving celebrities in the spotlight. G

[17] The Melodi programme which was aired on 26 June 2011 contained a segment on the family dispute between the first plaintiff and her biological family. It also contained materials consisting of statements and visuals regarding the plaintiffs' marriage in Thailand. It was also shown live on the same day at the Jom Heboh Carnival at Stadium Likas, Sabah, the venue where the Melodi programme was recorded. On 6 July 2011, the Melodi programme was aired again on or about 12:30pm to 1:30pm. On 9 July 2011, the Melodi programme was also uploaded to the internet portal of www.tonton.com.my and thus was accessible online anytime and anywhere by anyone in the world. H I

[18] The Melodi programme was in the form of an infotainment report touching on the first plaintiff's marriage in Thailand where it was alleged that the first plaintiff's biological father had refused to be her "wali" although she tried to persuade him to do so.

[19] The Melodi programme had amongst others, published the following words:

> Ha, tolong bertaubat katanya …
>
> Taubat, taubat cepat-cepat …
>
> (English translation:
>
> Ha … Please repent he said …
>
> Repent … repent quickly …)
>
> Nikah di Thailand memang sah di atas kertas sahaja, tapi di dalam agama, selagi orang tua masih hidup, nikah di Thailand dia tak sah.
>
> (English translation:
>
> Solemnisation in Thailand is only valid on paper, but according to religion, as long as your parents still alive, their marriage solemnisation in Thailand was not valid).

[20] According to the plaintiffs, the words have the effect of casting a slur on the plaintiffs' character and reputation, and were therefore defamatory of the plaintiffs. It was the plaintiffs' case that there were two stings in this case, which materially injured the plaintiffs.

[21] The first sting, is that the plaintiffs were alleged to be married without a wali, carried the meaning that the plaintiffs' marriage is void, and the plaintiffs are living in adultery and sin all this while. The plaintiffs' offspring, and in this instance their infant child, XXX, would carry the taboo of illegitimacy all her life.

[22] The second sting, that the first plaintiff had made statements that she had met her biological father and that he refused to be her wali, would result in the first plaintiff being called a liar, a scoundrel and an insolent daughter to her parents.

[23] The learned High Court Judge found in favour of the plaintiffs. It is undisputed that the first and second plaintiffs were married in Thailand and subsequently their marriage was registered in Hulu Langat's Syariah Court. The learned High Court Judge found that the issue of wali was a matter of Hukum Syara' for Muslims. Violation of that Hukum Syara' would carry a reprehensible consequence, as the issue of adultery, fornication and the status of legitimacy of the children out of the relationship would arise. The learned High Court Judge found that the defendants' case was placed on the wrong footing that the nikah ceremony in Thailand did not require a wali for a Muslim marriage.

[24] The learned High Court Judge found that the third defendant, during the airing of the Melodi programme on 26 June 2011 had full knowledge that the plaintiffs' wedding was declared valid by Mahkamah Syariah Hulu Langat on 26 May 2011 but decided not to reveal this crucial fact in the Melodi programme.

[25] On the issue of liability, as a primary trier of fact, the learned High Court Judge, as disclosed in her judgment, had carefully scrutinised, weighed all the evidences and adopted the correct approach before deciding that the words in question were defamatory of the plaintiffs and that the defendants had failed in their defences of justification and qualified privilege. In our judgment, on the issue of liability the findings of the learned High Court judge were clearly justified based on oral and contemporaneous evidence led during the trial. It has not been successfully shown to us that the findings of the learned High Court Judge on liability were against the weight of evidence or perverse in any way. We had therefore affirmed the decision of the learned High Court Judge on the issue of liability.

[26] When it came to the issue of award of damages, the judgment of the learned High Court Judge, with respect, ran into difficulties. As we have said earlier, the learned High Court Judge ordered the defendants to pay the plaintiffs a sum of RM250,000 as damages with interest. The reasons for awarding the said sum can be seen in the following passage of her judgment, with the necessary emphasis:

Ganti rugi

> 70. Dalam menentukan ganti rugi, saya mengambil kira keputusan dalam kes *Harry Issacs & Ors v. Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191 kes *Datuk Seri Utama Dr Rais bin Yatim v. Amizudin bin Ahmat* [2012] 2 MLJ 807, kes *Lee Kuan Yew v. Jeyaretnam Joshua Benjamin* [1009] 3 MLJ 322, kes *Syed Husin Ali v. Syarikat Perchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 dan kes *Rookes v. Barnard And Others* [1964] AC 1129.
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> 71. Saya telah pun mengupas dengan mendalam semua insiden yang berlaku dalam kes ini dan berasaskan semua itu, saya menyatakan persetujuan saya sepenuhnya dengan hujahan peguam cara plaintif yang bijaksana mengenai alasan dan asas yang sepatutnya diambil kira dalam mempertimbangkan ganti rugi dan kuantumnya. *Saya membenarkan tuntutan kedua-dua plaintif bagi ganti rugi, ganti rugi keterlaluan dan ganti rugi teladan. Saya membenarkan amaun secara global bagi ketiga-tiganya sebanyak RM250.000.00*. Saya juga membenarkan tuntutan plaintif di perenggan c, faedah atas amaun penghakiman sebanyak 5% dari tarikh penghakiman ke tarikh penyelesaian dan kos sebanyak RM70,000.00.

[27] As can be seen, the High Court's award of RM250,000 includes aggravated and exemplary damages.

[28] Before us, learned counsel for the defendants submitted that the damages awarded at RM250,000 were manifestly excessive; there was absolutely no basis for any aggravated or exemplary damages to be awarded. Learned counsel urged us to consider that the dispute in this unfortunate case concerned a family conflict. He added that the first to fourth defendants (collectively forming the media) were caught in the conflict when they sought to discharge their public duties by providing media coverage relating to this unfortunate case. Their coverage of this case was to intercede in the conflict. He added that it was a genuine good faith attempt to mend the family but the plaintiffs instead sued them for defamation. In the circumstances, according to learned counsel, if at all, the plaintiffs were only entitled to compensatory damages to appease the plaintiffs' injured feelings, and no aggravated or exemplary damages.

[29] In asserting their position that the award of RM250,000 was fair and reasonable, learned counsel for the plaintiffs argued that the reckless act of the defendants in defaming the plaintiffs had caused embarrassment, pain and irreparable damage to the plaintiffs. The insinuation of adultery and illegitimacy of their children will now haunt the plaintiffs for the rest of their lives. Therefore, learned counsel argued that it was clear that the learned High Court Judge had arrived at her decision on the award correctly on the basis of relevant laws and the established evidence.

[30] In the present case, the principal remedy sought by the plaintiffs was for an award of damages. Since libel had been established, as a matter of general rule, the law presumed some damage will result in the ordinary course when a defendant invades another's absolute right to reputation (see *Cheong Chark v. Gammon (Malaya) Ltd* [1939] 1 LNS 15; [1939] 1 MLJ 65). The general rule is that the law assesses damage on a purely compensatory basis. This will include any resultant social disadvantage, and compensation for the natural grief and distress, which the plaintiff might feel as a result of the statement having been published (see *Datuk Patinggi Abdul Rahman Ya'Kub v. Abang Mohammad bin Abang Anding* [1979] 1 LNS 16; [1979] 2 MLJ 185). The damages awarded operate both as a vindication of the plaintiff to the public and as a consolation to him for the wrong done (see *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56). The amount of damages will be governed by all the circumstances of the particular case, including the position and standing of the plaintiff, the nature of the libel and the whole conduct of the defendant from the time when the libel was published to very moment of its decision (see *Gatley on Libel and Slander,* 8th edn, pp. 592-593).

[31] The most important authority for the award of exemplary damages is the House Lords decision in *Rookes v. Barnard (No 1)* [1964] AC 1129. This decision recognised three broad categories where exemplary damages may be awarded. The first category is of those cases; where the plaintiff is injured

by the oppressive, arbitrary or unconstitutional action by the executive or the servant of the government. The second category is comprised of those cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. The third category is where a statute has expressly authorised it.

[32] Clearly, in the present case there is absolutely no basis for any exemplary damages, which is punitive in nature, to be even considered under any of the three categories as propounded by *Rookes v. Barnard (supra)*. On the contrary, the first to fourth defendants published the Melodi programme in response to the calls for help by the biological family members. The matter extended beyond just responding to the call for help. It was a programme designed to heal broken family relationships. There was no suggestion that the programme was a scheme calculated to make profits for the defendants.

[33] In most defamation cases, aggravated damages are often claimed together with exemplary damages. But then it is not the same and must be differentiated from the punitive purpose of exemplary damages; in that aggravated damages is still compensatory in nature. Aggravated damages may be awarded within the compensatory principles if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering, which is caused by the defamation and which may constitute injury to the plaintiff's pride and self-confidence (see *McCarey v. Associated Newspapers Ltd* [1964] 3 All ER 947).

[34] In the present case, there was no evidence that the defendants acted in any high-handed, oppressive, insulting or contumelious manner. The defendants broadcast the news in question without malice to disseminate information of a public interest. In particular, the first to fourth defendants were trying to intercede in this sad and regrettable family dispute to repair the cracks between the families.

[35] There was no evidence at all that there was any deliberate conduct on the part of the defendants to oppress or insult the plaintiffs. Any claim for aggravated damages must therefore be rejected to be plainly without basis.

[36] For all the reasons stated we held that there had not been established circumstances in the present case justifying either exemplary or aggravated damages, which the learned High Court Judge awarded in this case. The learned High Court Judge, with respect, was plainly wrong in awarding exemplary and aggravated damages. On the evidence of the present case, we found no evidence of any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendants which increased the mental pain and suffering of the plaintiffs. There was no basis to award exemplary and aggravated damages but the award of RM250,000 included such damages, which was plainly wrong.

[37] In consequence, this case was one for compensation in respect of the injury to the plaintiffs' reputation and honour. In the circumstances of this case, having considered the plaintiffs' position and standing as well as the nature of the defamation, which arose out of an unhappy case of family conflict, we held that a sum of RM80,000 by way of compensatory damages for both the plaintiffs was fair and reasonable to compensate them for the pain and suffering they had endured.

[38] We had therefore allowed the defendants' appeal only to this extent. The award of damages made by the High Court in the sum of RM250,000 was set aside and substituted with an award in the sum of RM80,000.